BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY E. KAISER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,710
YALE ENFORCEMENT SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 15, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

1. Whether claimant gave timely notice of accident.

2. Whether claimant met with personal injury by accident arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant began working in September of 2008 as a security guard working for respondent. He provided security for Dillon's stores and would work shifts ranging from four to twelve hours long. Claimant's uniform was provided to him, but he purchased his own shoes, which were heavy leather Skechers with heavy soles. Respondent required claimant to wear shoes that looked somewhat like a dress shoe. While working claimant

usually stood and walked around near the entrance to stores, but on occasion would walk around the store doing a walk about to keep an eye on things.[1]

About 10-11 years prior to the January 25, 2011, preliminary hearing, claimant was hospitalized and was diagnosed with diabetes mellitus. As a result, claimant was placed on oral medications and lost over 200 pounds. Six years prior to the preliminary hearing, claimant discontinued taking his diabetic medications so he could afford medications for his wife, who was ill at the time and passed away in December 2009.

Claimant has diabetic neuropathy in his feet, which makes it important for claimant to inspect his feet on a regular basis. Claimant could have an injured foot and not feel it, and the inspections assist in detecting a foot problem. He also wore white socks to sleep in to keep his feet warm and he wore them under the black socks he was required by respondent to wear when working. If claimant developed a blister on his foot, he would use dry dressing and keep the dressing in place with sports tape.

Around September 14, 2010, claimant noticed a blister on the outer edge of his left foot. Claimant treated the blister as described above and changed the dressing daily. On or about September 23 or 26, 2010, the blister popped and claimant dressed the wound and taped it as usual, except he also put antibiotic cream on the blister and foot powder on his foot along with the dressing. Claimant worked September 26, 2010, but left early due to being ill because of the flu.

Claimant remained home ill until October 1, 2010, when he noticed his left sock was stained with a foul smelling fluid, and when he felt his foot, he felt raw flesh. He then called in his girlfriend, Donna, who looked at claimant's foot and advised him to go to the hospital.[2] Claimant went to the Veterans Administration medical center, where he was initially treated with antibiotics and the wound was debrided. Claimant subsequently learned his foot would have to be amputated because the infection had reached his bone, and on October 4, 2010, he called his employer to tell them he was going to be unable to work due to the pending amputation.

Claimant alleges he first noticed the blister on his left foot around September 14, 2010. However, the Veterans Administration medical center (VA) records of October 1, 2010, indicate claimant told the physicians that: "Over 3-4 months [ago], he and his girlfriend noticed foul smelling discharge and the patient began experiencing increasing pain in his ankle with progressive difficulty with ambulation. The pain has previously been controlled with Aleve, now uncontrolled on OTC therapy."[3]

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[1] P.H. Trans. at 8.

[2] *Id.*, at 15.

[3] *Id.*, Resp. Ex. 1.

The October 2, 2010, progress notes of Dr. Christopher L. Anderson at the VA indicate a four-month history of left foot wound. The discharge notes of Dr. Rachael D. Hauser with Dr. George B. Martinez, attending physician, at the VA again state claimant noticed the foot problem 3-4 months earlier.[4] The records also indicate claimant had poorly controlled blood glucose levels, a history of noncompliance with oral therapy, did not follow a diabetic diet and had not been to the VA for treatment since 2002. Claimant indicated he does not recall telling the VA physicians that he noticed the blister 3-4 months earlier, but did acknowledge he might have told them he has a fear of hospitals.[5]

Claimant alleged a repetitive injury beginning September 20, 2010, through September 26, 2010, caused by his normal work duties, which involved standing and walking.

Claimant alleges that the blister on his left foot and subsequent left leg amputation below his knee constituted a personal injury that arose out of and in the course of his employment. Respondent first alleges claimant did not give timely notice as claimant first noticed the blister on September 14, 2010, but did not notify respondent of the injury until October 4, 2010. Respondent also argues claimant told VA doctors that claimant and his girlfriend noticed a foul odor from the blister 3-4 months earlier. Claimant responds by arguing claimant was not truly aware he suffered an injury until October 1, 2010.

Respondent's second defense is that claimant did not suffer a personal injury by accident that arose out of and in the course of his employment. Claimant was diagnosed with diabetes mellitus 10-11 years earlier and had discontinued taking medication that would help control the disease. Respondent argues claimant's diabetes predated his employment, and that claimant failed to prove the injury is work related. Respondent argues the blister could have easily developed outside of work.

The ALJ found the blister was due to excessive standing and walking by claimant at work, and that the amputation was causally related to the blister and accidental injury at work. The ALJ stated claimant notified his employer on October 4, 2010, he could no longer work due to the condition of his foot. By ordering medical and temporary total disability benefits, the ALJ implied claimant gave timely notice of his injury, but she did not make a finding as to the date of accident.

Whether claimant gave timely notice of accident

K.S.A. 44-520 sets out the requirements of a claimant to give timely notice of a work-related accident:

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[4] *Id.*, Resp. Ex. 2.

[5] *Id.*, at 32-33.

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant alleges a repetitive injury, and date of accident is determined by K.S.A. 44-508(d) which states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[6]

One must use a sequential process to determine date of accident in repetitive injury cases. Claimant was not taken off work or given restrictions by an authorized physician. The next step in the process is to determine when claimant gave written notice to the

[6] K.S.A. 2010 Supp. 44-508(d).

employer. It appears the first written notice of accident is claimant's Application for Hearing, which was filed on December 7, 2010. Therefore, pursuant to K.S.A. 2010 Supp. 44-508(d), this Board Member finds the date of accident is December 7, 2010. Therefore, claimant gave timely notice of accident since written notice was given on December 7, 2010, the date of accident.

Whether claimant met with personal injury by accident arising out of and in the course of his employment

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[7]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[11]

Claimant learned approximately 10-11 years ago that he has diabetes mellitus, and approximately six years ago discontinued taking oral medications that would assist in controlling the diabetes. While working for respondent as a security guard, claimant would stand and walk up to twelve hours a day. Claimant's diabetes mellitus is a pre-existing

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[7] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[10] K.S.A. 2010 Supp. 44-501(a).

[11] K.S.A. 2010 Supp. 44-508(g).

condition. Respondent argues there is insufficient evidence to prove claimant's blister occurred at work, and it argues that claimant's injury was caused by normal activities of day-to-day living. Respondent also argues the blister may have occurred 3-4 months earlier than October 1, 2010, which would bolster respondent's argument that claimant's injury was caused by normal day-to-day activities.

It is true that claimant's injury may have occurred while he was at work for respondent. However, the fact that claimant's injury may have occurred at work is insufficient to prove claimant's injury arose out of and in the course of his employment. Statements by claimant to VA personnel that his blister was present 3-4 months earlier cast doubt on claimant's assertion the blister occurred at work. Additionally, VA records indicate claimant had poorly controlled blood glucose levels, a history of noncompliance with oral therapy and did not follow a diabetic diet. Therefore, this Board Member finds claimant failed to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, the Board reverses the February 15, 2011, Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Kevin O'Connor, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[12] K.S.A. 44-534a.

[13] K.S.A. 2010 Supp. 44-555c(k).